89-1737

NO.

in the Supreme Court of the United States

OCTOBER TERM, 1989

NELSON EDGAR EMMENS,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

John W. Thornton, Jr.
THORNTON, ROTHMAN
& EMAS, P.A.
Attorney for Petitioner
200 South Biscayne Blvd.
Suite 2860
Miami, Florida 33131
(305) 358-9000

QUESTION PRESENTED

WHETHER THE OPINION OF THE ELEVENTH CIRCUIT AFFIRMING THE DENIAL OF EMMEN'S MOTION TO SUPPRESS CONFLICTS WITH DECISIONS OF THIS COURT OR HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT ON THE GROUND THE WARRANTLESS CUSTOMS SEARCH OF A PRIVATE AIRPLANE IN A COMPLETELY ENCLOSED PRIVATE HANGAR WITHIN THE CURTILAGE OF EMMEN'S HOME, IN THE ABSENCE OF EXIGENT CIRCUMSTANCES, CANNOT BE JUSTIFIED BY THE SEARCH AT THE FUNCTIONAL EQUIVALENT OF THE BORDER EXCEPTION TO THE WARRANT REQUIREMENT OF THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

NO.

In the Supreme Court of the United States

OCTOBER TERM, 1989

NELSON EDGAR EMMENS,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

NELSON EDGAR EMMENS, defendant and appellant in the courts below, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals, Eleventh Circuit, entered in this proceeding on February 7, 1990.

OPINIONS BELOW

The Order denying the motion to suppress by the United States District Court in and for the Southern District of Florida, was entered on August 16, 1988. A copy is included in the Appendix at the end of this petition at pages 3-7. The second order denying the petitioner's motion to suppress is found in the Appendix at pages 8-9. The opinion of the United States Court of Appeals for the Eleventh Circuit, reproduced and attached hereto in the Appendix at pages 15-21, was entered on February 7, 1990. It is reported at 893 F.2d 1292 (11th Cir. 1990).

JURISDICTIONAL STATEMENT

The judgment of the Eleventh Circuit was entered on February 7, 1990. This petition for writ of certiorari was filed within ninety days after the entry of such judgment. The jurisdiction of this court is invoked pursuant to 28 U.S.C. 1254 and Supreme Court Rule 10.1(c).

CONSTITUTIONAL PROVISION

The Fourth Amendment to the United States Constitution:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATUTORY PROVISION

The statutory provision with which EMMENS was charged by indictment is Title 21, United States Code, Section 952(a).

> §952. Importation of controlled substances
>
> (a) It shall be unlawful to import into the customs territory of the United States from any place outside thereof (but within the United States), or to import into the United States from any place outside thereof, any controlled substance.

STATEMENT OF THE CASE

U.S. Customs agents conducted a warrantless search of defendant NELSON EDGAR EMMENS' airplane, located in his completely enclosed private hangar within the curtilage of his home. The search disclosed three hundred kilograms of cocaine. United States Customs agents arrested EMMENS and charged him with two crimes: possessing with intent to distribute cocaine, a violation of 21 U.S.C. §841(a)(1); and importing cocaine into the United States, a violation of 21 U.S.C. §§952(a) & 960(a)(1). After the district court denied EMMENS' motion to suppress the cocaine, EMMENS pleaded guilty to the importation charge, reserving the right to appeal the denial of his motion. The Eleventh Circuit upheld the search and affirmed the conviction, stating:

> "We hold that Customs' warrantless search of an airplane inside the curtilage of the suspect's home is a lawful search if all other requirements for a valid search of that plane at the functional equivalent of the border are satisfied."

EMMENS piloted his small airplane across the Gulf of Mexico in a northeasterly direction, crossed the border of

the United States into Florida and did not stop the plane until after he landed at a private airstrip which abuts his home in Florida. Customs agents had continuously tracked EMMENS' flight. The Customs agents watched EMMENS land and park the plane in EMMENS' private hangar, located within the curtilage of his home, before landing their own helicopter and approaching EMMENS. MR. EMMENS was at all times unaware that he was being tracked or followed. The government, at the hearing on the motion to suppress, stipulated that Emmens had standing to contest the search.

EMMENS' 2.2-acre property, including the completely enclosed hangar building, is enclosed on three sides by a hedge; the fourth side abuts the grass airstrip. EMMENS does not own the airstrip; it is a private community airstrip centrally located for use by subdivision residents. The hangar is about sixty feet from EMMENS' house and is joined to the house by a driveway and a walkway. The house and the hangar are painted the same color and have the same shingles, shutters and landscaping. The hangar contains a place for parking the airplane, a three-car garage, a small workshop, a small office convertible into a bedroom with a closet and a full bathroom. There is a telephone extension in the hangar which utilized the same line as the main house. There is also a TV cable line hooked up to that portion of their home that they called the hangar/garage area. The EMMENS spent as much time in the house as they did in the hangar area. The hangar area is secured by a key lock and code lock to which only the EMMENS have the keys and combination. There are no windows in the hangar. The EMMENS family did not sleep in the hangar building, but made several trips there each day to retrieve items that were stored there, such as cleaning supplies, gardening tools and soft drinks. The EMMENS' made the hangar into an extension of their home. It was their home. It was part of their house.

When Customs agents approached EMMENS, he was out of the plane and was leaving the hangar. He had already activated the hangar's electric door closer. As the Customs UX-60 Blackhawk helicopter landed with the agents exiting with drawn weapons, EMMENS immediately laid on the ground in spread-eagle fashion with his legs across the threshold of the hangar. Agent Pior had EMMENS move outside so that the door would not injure EMMENS' legs. Customs agents then entered the private hangar and stopped the door from completely closing.

After handcuffing EMMENS, Custom's Agent Gary Pior entered the hangar by means of the electric door Pior had kept from closing. Customs agents conducted a security sweep of the hangar to make sure there were no weapons or people in EMMENS' hangar area. Through the window of the plane, Pior saw that someone had removed the plane's rear seat, and he saw duffel bags where the seat would have been. Pior took the key from the defendant's pocket in order to unlock the plane. Pior opened the plane's cabin door and put his head inside the plane. He then unzipped one of the twelve duffel bags and observed individually wrapped packages which his experience indicated could contain contraband. Agent Pior then secured the entire hangar so that no one could come into the area. Pior field tested the substance in the packages and concluded that it was cocaine. By this time DEA agents were also on the scene, but no DEA agents participated in the search of the airplane.

The district court conducted two hearings on EMMENS' motion to suppress the cocaine. After the first hearing the court said, "The mere fact that a border entry had been made makes the search reasonable." The evidence presented at the second hearing related to the fact that the private hangar was part of the curtilage of EMMENS' home. The district court ratified and confirmed its prior order.

The Eleventh Circuit affirmed the district court's denial of the motion to suppress.

This Petition for Writ of Certiorari follows.

ARGUMENT

A WARRANTLESS CUSTOMS SEARCH OF A PRIVATE AIRPLANE IN A COMPLETELY ENCLOSED PRIVATE HANGAR WITHIN THE CURTILAGE OF THE HOME, IN THE ABSENCE OF EXIGENT CIRCUMSTANCES, IS NOT JUSTIFIED BY THE "SEARCH AT THE FUNCTIONAL EQUIVALENT OF THE BORDER" EXCEPTION TO THE WARRANT REQUIREMENT OF THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

The Eleventh Circuit in its opinion in this case set the parameters for this Court's decision on this issue of first impression:

> We hold that Customs' warrantless search of an airplane inside the curtilage of the suspect's home is a lawful search if all other requirements for a valid search of that plane at the functional equivalent of the border are satisfied.

It is unquestioned that a search at the functional equivalent of the border is an exception to the Fourth Amendment warrant requirement. *Almeida-Sanchez v. United States*, 413 U.S. 266 (1973); *United States v. Ramsey*, 431 U.S. 606 (1977). Petitioner concedes that the facts presented constitute a search at the functional equivalent of the border. The sole issue is whether this warrant exception is applicable where the search takes place in the home or its curtilage under the unique facts of this case.

It is also beyond cavil that the fourth amendment protects the curtilage as part of the home because it harbors the intimate activity associated with the sanctity of a man's home and the privacies of life. *Oliver v. United States*, 466 U.S. 170, 180 (1984). This Court, in *United States v. Dunn*, ____ U.S. ____, 107 S.Ct. 1134, 1139, ____ L.Ed.2d ____ (1987), held that the curtilage is protected because it is so intimately tied to the home itself that it should be placed under the home's "umbrella" of fourth amendment protection.

Specifically, this Court held in *Oliver v. United States*, 466 U.S. 170, 180 (1984),

> [T]he curtilage is the area to which extends the intimate activity associated with the 'sanctity of a man's home and the privacies of life,'. . . and therefore has been considered *part of home itself* for Fourth Amendment purposes. (Emphasis added).

In the instant case not only do the facts justify the conclusion that the private hangar is inside the home's curtilage, as the Eleventh Circuit below held, but further that the hangar area functions as the home itself and is therefore protected from warrantless searches. EMMENS' 2.2-acre property, including the completely enclosed hangar building, is enclosed on three sides by a hedge; the fourth side abuts the grass airstrip. EMMENS does not own the airstrip; it is a private community airstrip centrally located for use by subdivision residents. The hangar is about sixty feet from EMMENS' house and is joined to the house by a driveway and a walkway. The house and the hangar are painted the same color and have the same shingles, shutters and landscaping. The hangar contains a place for parking the airplane, a three-car garage, a small workshop, a small office convertible into a bedroom with a closet and a full bathroom. There is a telephone extension in the hangar which utilized the same line as the main house. There is also

a TV cable line hooked up to that portion of their home that they called the hangar/garage area. The EMMENS spent as much time in the house as they did in the hangar area. The hangar area is secured by a key lock and code lock to which only the EMMENS have the keys and combination. There are no windows in the hangar. The EMMENS family did not sleep in the hangar building, but made several trips there each day to retrieve items that were stored there, such as cleaning supplies, gardening tools and soft drinks. The EMMENS' made the hangar into an extension of their home. It was their home. It was part of their house.

These facts lead us to the ultimate issue: whether the fact that the plane was inside the hangar area, and thus inside the curtilage of the home, requires that the government obtain a search warrant before conducting such a search when exigent circumstances are absent.

This Court stated in *United States v. United States District Court*, 407 U.S. 297, 313 (1972), that "the physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed." In *G.M. Leasing Corp. v. United States*, 429 U.S. 338, 354 (1977), this Court opined,

> It is one thing to seize without a warrant property resting in an open area or seizable by levy without an intrusion into privacy, and it is quite another thing to effect a warrantless seizure of property, even that owned by a corporation, situated on private premises to which access is not otherwise available for the seizing officer.

Reaffirming the difference between the home and any other place, this Court held in *Payton v. New York*, 445 U.S. 573, 591 (1980):

> In terms that apply equally to seizures of property and to seizures of persons, the Fourth Amendment has drawn a firm line at the entrance to the house.

> Absent exigent circumstances, that threshold may not reasonably be crossed without a warrant.

The *Payton* Court found persuasive and compelling language in *United States v. Reed*, 572 F.2d 412, 423 (2nd Cir. 1978),

> ". . . an invasion of the sanctity of the home. . . is simply too substantial an invasion to allow without a warrant, at least in the absence of exigent circumstances, even when it is accomplished under statutory authority and when probable cause is clearly present."

See Payton, 445 U.S. at 588.

The exigent circumstances which can justify a warrantless search were set forth by this Court in *Vale v. Louisiana*, 399 U.S. 30, 35 (1970): officers responding to an emergency, hot pursuit of a fleeing felon, goods seized in the process of destruction and goods about to be removed from the jurisdiction.

In this case there was no emergency to which the agents were responding. Nor were the agents in hot pursuit of a fleeing felon. Here the Customs plane was conducting a routine tracking and surveilling of the defendant. There was no chase. The agents landed the helicopter, handcuffed the defendant—who was unaware of the fact that he was being surveilled—and moved him to a location further outside and away from the hangar. The agents then conducted a "security sweep" of the hangar/garage area and assured themselves that there were no weapons or people. They then secured the area so that no one could enter. The facts recited belie any possibility that the evidence contained in the hangar (ie: the plane and its contents) would be destroyed, concealed or moved. None of the exigent circumstances cited above are applicable here.

The proper procedure would have been to secure the premises pursuant to *Segura v. United States*, 468 U.S. 796 (1984) and attempt to obtain a search warrant. As this Court noted in *Vale v. Louisiana, supra* at 34:

> "Belief, however well founded, than an article sought is concealed in a dwelling house furnishes no justification for a search of that place without a warrant. . . . That basic rule has never been questioned in this Court."

As Mr. Justice Jackson so cogently observed in *Johnson v. United States*, 333 U.S. 10, 13-14 (1948):

> The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime. Any assumption that evidence sufficient to support a magistrate's disinterested determination to issue a search warrant will justify the officers in making a search without a warrant would reduce the Amendment to a nullity and leave the people's homes secure only in the discretion of police officers. Crime, even in the privacy of one's own quarters, is, of course, of grave concern to society, and the law allows such crime to be reached on proper showing. The right of officers to thrust themselves into a home is also a grave concern, not only to the individual but to a society which chooses to dwell in reasonable security and freedom from surveillance. *When the right of privacy must reasonably yield to the right of search is, as a rule, to be decided by a judicial officer, not by a policeman or Government*

enforcement agent. (Footnotes omitted) (Emphasis added).

When Customs agents wish to search an enclosed building inside the curtilage of a suspect's home they must first obtain a search warrant even if the curtilage is considered the functional equivalent of the border. Following the dictates of this Court's interpretation of the fourth amendment, the privacy of the home must take precedence over an agent's potentially arbitrary in-the-heat-of-the-moment decision to search without a warrant. This is especially true when the decision involves an agent's discretion in crossing the firm line this Court and the Constitution have drawn at the entrance to the home.

CONCLUSION

For the foregoing reasons, Petitioner NELSON EMMENS, respectfully prays that the Petition for Writ of Certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit be granted.

Respectfully submitted,

THORNTON, ROTHMAN
& EMAS, P.A.
200 South Biscayne Blvd.
Suite 2860
Miami, Florida 33131
(305) 358-9000

By: _____
JOHN W. THORNTON, JR.

Dated this 7th day of May, 1990.

Appendix

INDEX TO APPENDIX

[FILED MAY 17, 1988]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

NO. 88-8056

21 USC 841(a)(1), 952(a), 960(a)(1)
CR-GONZALEZ

UNITED STATES OF AMERICA

v.

NELSON EDGAR EMMENS

INDICTMENT

The Grand Jury charges that:

COUNT I

On or about May 11, 1988, at Delray Beach, Palm Beach County, in the Southern District of Florida, and elsewhere, the defendant

NELSON EDGAR EMMENS

did knowingly and intentionally possess with intent to distribute a controlled substance, that is, a quantity of cocaine, a Schedule II narcotic controlled substance.

It is further charged that the amount of cocaine involved was at least five (5) kilograms.

All in violation of Title 21, United States Code, Section 841(a)(1).

COUNT II

On or about May 11, 1988, at Delray Beach, Palm Beach County, in the Southern District of Florida and elsewhere, the defendant

did knowingly and intentionally import into the United States, from a place outside thereof, a controlled substance, that is, a quantity of cocaine, a Schedule II narcotic controlled substance.

It is further charged that the amount of cocaine involved was at least five (5) kilograms.

All in violation of Title 21, United States Code, Sections 952(a) and 960(a)(1).

A TRUE BILL

/s/ Diane R Leedy

/s/ Leon B. Kellner
LEON B. KELLNER
UNITED STATES ATTORNEY

/s/ Thomas O'Malley
THOMAS O'MALLEY
ASSISTANT UNITED STATES ATTORNEY

[FILED AUGUST 16, 1988]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 88-8056-CR-GONZALEZ

UNITED STATES OF AMERICA,

Plaintiff,

vs.

NELSON EDGAR EMMENS

Defendant.

O R D E R

THIS CAUSE has come before the court upon the Motion to suppress of the defendant, Nelson Edgar Emmons. Emmons seeks suppression of approximately 300 kilograms of cocaine hydrochloride seized by U.S. Customs officials during a warrantless search of an aircraft located in defendant's private hangar. Emmens also moves to suppress all items seized from his home pursuant to a warrant.

The court held an evidentiary hearing on defendant's Motion to Suppress on July 21, 1988 and determines that suppression of the evidence is not required, for the following reasons.

The government and defendant stipulate that the defendant has standing to make this motion, that the aircraft in question was flown by the defendant, and that the plane entered the United States at Naples, Florida and flew east to its landing point at Antiquers Field in Delray Beach, Florida. The sole dispute is whether the warrantless search of defendant's aircraft was legal.

The facts adduced at the evidentiary hearing established that both U.S. Customs and the Drug Enforcement Agency (DEA) had been investigating

defendant Emmens for two years. They learned, through three confidential informants, that Emmens would be flying a cargo of cocaine from Columbia to either the United States or the Bahamas on May 11, 1988.

Late in the afternoon on May 11, 1988, a U.S. Customs radar plane detected an aircraft in the Gulf of Mexico, travelling toward the United States from the southwest. The aircraft was relatively small, flying at a low altitude and was sending no transponder signal to identify itself.

After the aircraft entered the United States, a U.S. Customs ground radar took over surveillance of the plane. A ground radar installation at Tyndall Air Force Base tracked the suspect aircraft as it travelled east across Florida. They also tracked another aircraft which appeared to be performing countersurveillance for the suspect aircraft.

Near Delray Beach, Florida, U.S. Customs and DEA agents were awaiting Emmen's arrival, pursuant to the tip made by the confidential informants. A second Customs radar surveillance plane, a Cessna Citation 550 jet, took over surveillance of the suspect aircraft. The Citation was in radio and telephone contact with a nearby U.S. Customs Blackhawk helicopter, and with DEA and Customs agents. When the suspect aircraft made its approach toward a landing strip near Emmen's home, the Citation notified the Blackhawk helicopter and the agents on the ground. The Blackhawk landed on the airstrip following the suspect aircraft.

Defendant's plane had taxied into his private hangar, which was located off an airstrip behind defendant's home. When the Customs agents approached the defendant, he was lying spread-eagle on the ground. The hangar's door was closing, but Customs stopped the door from closing completely.

The Customs agent on the scene, Gary Pior, observed that the aircraft had taped on tail numbers and contained

what appeared to be two figures on the back seat. Upon entering the hangar and approaching the plane, Pior found the two figures were mannequins of Prince Charles and Diana, propped upon duffel bags. Pior also found an unapproved extra fuel tank on the plane. The plane's back seat had been removed and appeared to be in the hangar. The aircraft contained numerous duffel bags which contained many individually wrapped packages. The Customs agent field tested the content of one of the packages. The contents tested positive for cocaine.

At that point, Customs seized the contents of the aircraft as well as the aircraft and roped off the hangar. DEA then applied for a search warrant for the defendant's home. Based upon the evidence seized by Customs, the U.S. Magistrate issued the warrant, which was executed on May 12, 1988.

Defendant contends that the Customs' search of the aircraft violated his reasonable expectation of privacy in the airplane hangar. Because the hangar was located 20 yards from defendant's home, defendant argues that the agents were not permitted to enter the hangar without a warrant. This court disagrees.

"'Two requirements must be met before a person may successfully prevail on a fourth amendment claim." *United States v. Rachner*, 706 F.2d 1121, 1125 (11th Cir. 1983) *cert. denied*, 464 U.S. 896 (1984). The first is that "there must be an invasion of the claimant's reasonable expectation of privacy." *Id.*, citing *Katz v. United States*, 389 U.S. 347, 88 S. Ct. 507, 19 L.Ed.2d 576 (1967). "Second, the challenged search and seizure must be 'unreasonable,' as not all searches and seizures are proscribed by the fourth amendment, but only those that are 'unreasonable.' " *Bachner*, 706 F.2d at 1125 citing *Elkins v. United States*, 364 U.S. 206, 222, 80 S. Ct. 1437, 1446, 4 L.Ed.2d 1669 (1960).

Even assuming, *arguendo*, that defendant had a legitimate expectation of privacy in the airplane hangar, there was no violation of the fourth amendment in this case because the search by the U.S. Customs' agents was not unreasonable.

"Border searches constitute a well-known exception to the mandate of the fourth amendment." *Bachner*, 706 F.2d at 1125. The policy behind the the border search exception is the recognition of "the fundamental necessity for national protection against unlawful entries from without." *United States v. Stone*, 659 F.2d 569, 572 (5th Cir., Unit B., Oct. 19, 1981). The need to protect the borders is so great that searches may be conducted far away from the actual physical borders. For example, the search may be properly conducted in ports where incoming ships dock as well as at airports where international flights land. *Bachner*, 706 F.2d at 1128 citing *Stone*, 659 F.2d 569.

"Furthermore, a particular *search* may be the functional equivalent of a search at the border if the object of the search has been kept under constant surveillance from the border to the point of search. *United States v. Johnson*, 588 F.2d 147, 154 (5th Cir. 1979)." *Bachner*, 706 F.2d at 1128, quoting *Stone*, 659 F.2d at 572.

In this case, it is undisputed that the aircraft entered the United States without declaring itself. The aircraft had been constantly surveilled since it was located over the Gulf of Mexico until it landed in Delray Beach, Florida. The mere fact that a border entry had been made makes the search reasonable. *Bachner*, 706 F.2d at 1128, quoting *United States v. Ramsey*, 431 U.S. 606, 620, 97 S. Ct. 1972, 1981, 52 L.Ed.2d 617 (1977).

Because the court finds that the warrantless search conducted by the U.S. Customs agents was not unreasonable, it is hereby

ORDERED AND ADJUDGED that the Motion to Suppress of the defendant Nelson Edgar Emmens be and the same is DENIED.

DONE AND ORDERED at Chambers, Fort Lauderdale, Florida, this 16th day of August, 1988.

/s/ Jose A. Gonzalez, Jr.
JOSE A. GONZALEZ, JR.
UNITED STATES DISTRICT JUDGE

cc: David Axelrod, Esq.
Scott Lange, Esq.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

NO. 88-8056-CR-Gonzalez

UNITED STATES OF AMERICA,

vs.

NELSON EDGAR EMMENS,

Defendant.

Wednesday, November 16, 1988
Fort Lauderdale, Florida

FURTHER MOTION TO SUPPRESS and CHANGE OF PLEA BEFORE THE HONORABLE JOSE A. GONZALEZ, JR.

APPEARANCES:

For the Government:	DAVID AXELORD, Assistant U.S. Attorney
For the Defendant:	JOHN THORNTON, ESQ.
Court Reporter:	ANITA LaROCCA 299 E. Broward Boulevard Fort Lauderdale, Florida

THE COURT: The Court has considered the additional testimony offered by the defendant, that of the witness Ella Emmens; the Court has further considered the additional authority cited by the defendant, to wit United States versus Dunn, 107 Supreme Court 1134; the Court has reconsidered the order of August the 16th, 1988.

Considering the additional testimony and the additional legal authorities cited by the accused, the Court finds that no violation of the Fourth Amendment of the constitution of the United States has been demonstrated.

The Court additionally finds that the search and seizure in question were reasonable under the circumstances. Accordingly, the Court will ratify and confirm its prior order of August the 16th, 1988 and the motion to suppress will stand denied.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

NO. 88-8056-CR-Gonzalez

UNITED STATES OF AMERICA,

vs.

NELSON EDGAR EMMENS,

Defendant.

Wednesday, November 16, 1988
Fort Lauderdale, Florida

FURTHER MOTION TO SUPPRESS and CHANGE OF PLEA BEFORE THE HONORABLE JOSE A. GONZALEZ, JR.

APPEARANCES:

For the Government:	DAVID AXELORD, Assistant U.S. Attorney
For the Defendant:	JOHN THORNTON, ESQ.
Court Reporter:	ANITA LaROCCA 299 E. Broward Boulevard Fort Lauderdale, Florida

THE COURT: Rule 11(a)(2) of the Federal Rules of Criminal Procedure provides that—with the approval of the Court and the consent of the Government—you can enter a conditional plea of guilty, reserving in writing the right on appeal from a judgment of guilt to review the adverse determination of this Court on any pretrial motion.

As you know, because you've been present, your counsel on your behalf have filed pretrial motions to suppress the evidence in this case.

As you likewise know, those motions have been denied. You tender this plea udner Rule 11 (a)(2)—your tender of a plea under Rule 11(a)(2) of the Federal Rules of Criminal Procedure, is in effect a conditional tender.

Which simply means that you plead guilty with the right to appeal the adverse ruling of this Court with regard to the motion to suppress.

Nevertheless, if the Court finds that there is—based upon your plea and upon the evidence that the Government may offer, that you are guilty, the Court will find you guilty and you will be subject to be sentenced accordingly.

The difference is, though, that you have the right to appeal the Court's ruling on the pretrial motion to suppress. If the Court of Appeals reverses the motion to suppress, finds that this Court is in error, and in effect suppresses the evidence, you will then be permitted to withdraw your tendered plea of guilty and reinstate your previously entered plea of not guilty in this case.

Do you understand that procedure?

THE DEFENDANT: Yes, Your Honor.

THE COURT: You've discussed that with your lawyer?

THE DEFENDANT: Yes, I have.

THE COURT: Do you have any questions about it?

THE DEFENDANT: None at all.

THE COURT: All right.

[FILED FEB 6, 1989]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case Number 88-8056-CR-GONZALEZ

UNITED STATES OF AMERICA

V.

NELSON EDGAR EMMENS

(Name of Defendant)

John Thornton
200 S. Biscayne Blvd. #2860
Miami, FL 33131
Defendant's Attorney

JUDGMENT INCLUDING SENTENCE UNDER THE SENTENCING REFORM ACT

THE DEFENDANT:

pleaded guilty to count(s) Two of the Indictment.

Accordingly, the defendant is adjudged guilty of such count(s), which involve the following offenses:

Title & Section 21: 952(a) and 960(a)(1)

Nature of Offense Importation of cocaine

Count Number(s) 2

The defendant is sentenced as provided in pages 2 through 4 of this Judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☒ Count(s) one of the Indictment (is) dismissed on the motion of the United States.

☒ It is ordered that the defendant shall pay to the United States a special assessment of $50.00, which shall be due immediately.

It is further ordered that the defendant shall notify the United States Attorney for this district within 30 days of any change of residence or mailing address until all fines, restitution, costs, and special assessments imposed by this Judgment are fully paid.

Defendant's Soc. Sec. Number: unknown

Defendant's mailing address: MCC—Miami #27394-004

Defendant's residence address: 7094 Skyline Dr., Delray Beach, FL

Date of Imposition of Sentence February 3, 1989

Signature of Judicial Officer Jose A. Gonzalez Jr.

Name & Title of Judicial Officer Jose A. Gonzalez, Jr., U.S. Dist. Judge

Date February 3, 1989

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of TWO HUNDRED AND TEN (210) MONTHS.

The defendant shall receive credit for time spent in federal custody as to this offense.

The Court makes the following recommendations to the Bureau of Prisons: FCI, Marianna, Florida

The defendant is remanded to the custody of the United States Marshal.

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of FIVE (5) Years.

While on supervised release, the defendant shall not commit another Federal, state, or local crime and shall comply with the standard conditions that have been adopted by this court (set forth on the following page). If this judgment imposes a restitution obligation, it shall be a condition of supervised release that the defendant pay any such institution that remains unpaid at the commencement of the term of supervised release. The defendant shall comply with the following additional conditions:

☒ The defendant shall pay any fines that remain unpaid at the commencement of the term of supervised release.

FINE WITH SPECIAL ASSESSMENT

The defendant shall pay to the United States the sum of $150,050.00, consisting of a fine of $150,000.00 and a special assessment of $50.00.

These amounts are the totals of the fines and assessments imposed on individual counts, as follows:

Pursuant to the Comprehensive Crime Control Act of 1984 the defendant is hereby assessed $50.00, payable to the Office of the U.S. Attorney Miami, Florida.

The court further imposes a fine of One Hundred and Fifty Thousand Dollars. ($150,000.00)

This sum shall be paid immediately.

UNITED STATES of America,
Plaintiff—Appellee,

v.

Nelson Edgar EMMENS,
Defendant—Appellant.

No. 89-5152.

United States Court of Appeals,
Eleventh Circuit

Feb. 7, 1990.

Defendant was convicted of importation of cocaine on his plea of guilty in the United States District Court for the Southern District of Florida, No. 88-8056-Cr-JAG, Jose A Gonzalez, Jr., J., and he appealed. The Court of Appeals, Edmondson, Circuit Judge, held that warrantless search of airplane inside hangar located near suspect's home was a lawful search at functional equivalent of border without any opportunity for plane to have changed materially since time it crossed United States border.

Affirmed.

1. Customs Duties—126(7)

Search of airplane in suspected narcotics importer's private hangar, which was arguably part of curtilage of suspect's home, was reasonable search by Customs at functional equivalent of border under the circumstances; Customs had continuously tracked plane as it flew over the Gulf of Mexico and across United States border and stopped suspect and conducted search as soon as he parked the plane, allowing him only enough time to park plane in hangar to prevent him from flying away and escaping. U.S.C.A. Const.Amend. 4.

2. Searches and Seizures—26, 27

A dwelling, together with its surrounding curtilage, is not always a sanctuary from law enforcement activity, even if police act without a warrant. U.S.C.A. Const.Amend. 4.

3. Customs Duties—126(7)

Customs' warrantless search of an airplane inside the curtilage of a suspect's home is a lawful search if all other requirements for a valid search of that plane at the functional equivalent of the border are satisfied, including requirement that there has been no opportunity for object of search to have changed materially since time of border crossing. U.S.C.A. Const.Amend. 4.

John W. Thornton, Jr., Thornton & Rothman, P.A., Miami, Fla., for defendant-appellant.

Dexter W. Lehtinen, U.S. Atty., Miami, Fla., Linda Collins Hertz, Harriet R. Galvin, David F. Axelrod, Asst. U.S. Atty., for plaintiff-appellee.

Appeal from the United States District Court for the Southern District of Florida.

Before FAY and EDMONDSON, Circuit Judges, and HALTOM*, District Judge.

EDMONDSON, Circuit Judge:

A warrantless search of defendant Nelson Edgar Emmens' airplane disclosed three hundred kilograms of cocaine. United States Customs agents arrested Emmens and charged him with two crimes: possessing with intent to distribute cocaine, a violation of 21 U.S.C. § 841(a)(1); and importing cocaine into the United States, a violation of 21

---

*Honorable E.B. Haltom, Jr., U.S. District Judge for the Northern District of Alabama, sitting by designation.

U.S.C. §§ 952(a) & 960(a)(1). After the district court denied Emmens' motion to suppress the cocaine, Emmens pleaded guilty to the importation charge. Pursuant to the plea agreement, the Government dismissed the possession charge. Emmens reserved the right to appeal the denial of his motion. The issue before this court is the validity of the warrantless search of Emmens' airplane. We uphold the search and affirm the conviction.

Emmens agrees that he piloted a small airplane across the Gulf of Mexico in a northeasterly direction; that he crossed the border of the United States into Florida; and that he did not stop the plane until after he landed at an airstrip which abuts his home in Florida. Customs agents, working with Drug Enforcement Agency ("DEA") officers, had continuously tracked Emmens' flight, following tips from informants that Emmens would be bringing cocaine from Colombia. The Customs agents allowed Emmens to land and to park the plane in Emmens' private hangar before landing their helicopter and approaching Emmens. The agents held back to avoid any risk that Emmens would take off and escape.

The hangar was about sixty feet from Emmens' house and was joined to the house by a driveway and a walkway. The house and the hangar were painted the same color and had the same shingles, shutters, and landscaping. The hangar building contained a place for parking the airplane, a three-car garage, a small workshop, and a small office. The Emmens family did not sleep in the hangar building, but made several trips there each day to retrieve items that were stored there, such as cleaning supplies and soft drinks. Emmens' 2.2-acre property, including the hangar building, was enclosed on three sides by a hedge; the fourth side abutted the grass airstrip. Emmens did not own the airstrip; it was a private community airstrip centrally located for use by subdivision residents.

When Customs agents approached Emmens, he was out of the plane and leaving the hangar. Before the agents could say anything, Emmens immediately lay on the ground in spread-eagle fashion with his legs across the threshold of the hangar. Emmens had apparently activated the hangar's electric door closer, and Customs agents stopped the door from closing so that it would not injure Emmens' legs. Customs agents could see the plane through the open door.

After handcuffing Emmens to protect agents from Emmens and to protect Emmens from being hurt should he make any overt movements—Customs Agent Gary Pior entered the hangar by means of the open door. Through the window of the plane, Pior saw that someone had removed the plane's rear seat, and he saw duffel bags where the seat would have been. Pior opened the plane's cabin door and put his head inside the plane. He then opened one of the twelve duffel bags and observed individually wrapped packages which his experience indicated could contain contraband. Pior field tested the substance in the packages and concluded that it was cocaine. By this time DEA agents were also on the scene, but no DEA agents participated in the search of the airplane. Neither Customs nor DEA searched the hangar.

The district court conducted two hearings on Emmens' motion to suppress the cocaine. After the first hearing, at which Customs and DEA agents testified, the court said "[t]he mere fact that a border entry had been made makes the search reasonable." The evidence presented at the second hearing related to whether the hangar was part of the curtilage of Emmens' home. Without deciding this question, the district court ratified and confirmed its prior order.

The Government contends that the warrantless search of Emmens' plane was justified as a search at the functional equivalent of the border. We agree.

Border searches have long "been considered to be 'reasonable' by the single fact that the person or item in question had entered into our country from outside." *United States v. Ramsey*, 431 U.S. 606, 619, 97 S.Ct. 1972, 1980, 52 L.Ed.2d 617 (1977). That border searches comprise an exception to the mandates of the fourth amendment is well settled, and neither a warrant nor any level of suspicion is required to search vehicles, including aircraft, arriving in the United States. *United States v. Carter*, 760 F.2d 1568, 1576 (11th Cir.1985); *United States v. Bachner*, 706 F.2d 1121, 1128 (11th Cir.1983). A border search need not take place at the actual border, but may be conducted at any place that may be considered the functional equivalent of the border. *Carter*, 760 F.2d at 1576. "A border search may be conducted away from the actual border if: (1) there is a reasonable certainty that the object of the search has just crossed the border, (2) the search takes place at the first practicable point after the border was crossed, and (3) there has been no time or opportunity for the object of the search to have changed materially since the time of the crossing." *Id.*

[1] Emmens' counsel admitted to the district judge that these three requirements were satisfied and that, under the same circumstances, had Customs searched the plane while it was on the airstrip, the search would have been a lawful border search. But Emmens argues that because the plane was in his private hangar, which Emmens characterizes as part of the curtilage of his home, Customs agents could not search the plane. Put another way, Emmens is asking this court to rule that, because the airplane—which would ordinarily be subject to a border search—reached an area located within the curtilage of Emmens' home before the first practicable time that Customs could conduct the search, Customs was prohibited from searching the plane without a warrant. Assuming the hangar was actually part of the curtilage of Emmens' home,

we decline to rule as Emmens urges; instead we hold that Customs' search was reasonable given the circumstances.[1]

The record shows that Customs continuously tracked Emmens' plane as it flew over the ocean and crossed the United States border. As soon as Emmens parked the plane, Customs stopped Emmens and conducted the search. Customs agents allowed Emmens only enough time to park the plane in the hangar to prevent Emmens from flying away and escaping. This court has recognized that an airplane's mobility and 360-degree range of airborne escape routes justify Customs permitting a suspected smuggler to reach a secure location before confrontation. *See United States v. Brennan*, 538 F.2d 711, 721 (5th Cir.1976).[2]

---

[1]Under case law and statutory authority, Customs' search of Emmens' plane was lawful if the hangar was *not* part of the curtilage of Emmens' home. *See United States v. Lueck*, 678 F.2d 895, 902 (11th Cir.1982) (warrantless search of car that was parked inside hangar upheld where suspect crossed border in airplane, parked plane in hangar, and then transferred packages from plane to car; hangar was located at airport and suspect as lessee had exclusive control over hangar); 19 U.S.C. § 1595(b) (1982) ("Any person authorized by this chapter to make searches and seizures . . . may, if deemed necessary . . . enter into or upon or pass through the lands, inclosures, and buildings, other than the dwelling house, of any person whomsoever, in the discharge of his official duties.").

The Government argues that section 1595(b), quoted above, justified the search in this case becuase it permitted Customs agents to enter any building located on Emmens' property other than his dwelling house, even if that other building was curtilage. Because we affirm the denial of Emmens' motion to suppress on other grounds, we need not rely on 1595(b) to justify the search in this case. We note, however, that 1595(b) does not limit any authority granted Customs by other sources to make warrantless searches. *Cf. United States v. Jacobson*, 647 F.2d 990, 993-94 (9th Cir.1981) (section 1595(b) provided specific authorization to Customs agents to conduct otherwise reasonable warrantless search that required entry into private driveway).

[2]In *Bonner v. City of Prichard*, 661 F.2d 1206 (11th Cir.1981) (*en banc*), this court adopted as precedent all decisions of the former Fifth Circuit Court of Appeals decided prior to October 1, 1981.

[2,3] A dwelling, together with its surrounding curtilage, is not always a sanctuary from law enforcement activity, even if the police act without a warrant. The Supreme Court has refused to permit a suspect to defeat a warrantless arrest that has been set in motion in a public place—and which is otherwise proper—by the expedient of escaping to a private place. *See United States v. Santana*, 427 U.S. 38, 43, 96 S.Ct. 2406, 2410, 49 L.Ed.2d 300 (1976) (hot pursuit case). We similarly refuse to allow Emmens to cross the border in an airplane and then to thwart Customs' lawful right to search that airplane at the first practicable point by his parking the plane in a private place.[3] To hold otherwise would be to force Customs agents to play "tag" with suspected smugglers. Nothing in the fourth amendment mandates this kind of game playing. We hold that Customs' warrantless search of an airplane inside the curtilage of the suspect's home is a lawful search if all other requirements for a valid search of that plane at the functional equivalent of the border are satisfied, including the requirement that there has been no opportunity for the object of the search to have changed materially since the time of the border crossing.

The district court's denial of the motion to suppress and Emmens' conviction are AFFIRMED.

---

[3]We recognize that *Santana* is not identical to this case because there the arrest was justified by some suspicion of wrongdoing. The element that justifies searches at the functional equivalent of the border and makes such searches constitutionally reasonable is the crossing of the border.

(2)

No. 89-1737

In the Supreme Court of the United States

OCTOBER TERM, 1989

NELSON EDGAR EMMENS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

KENNETH W. STARR
Solicitor General
EDWARD S.G. DENNIS, JR.
Assistant Attorney General
JOSEPH C. WYDERKO
Attorney

Department of Justice
Washington, D.C. 20530
(202) 514-2217

QUESTION PRESENTED

Whether the Customs agents' warrantless search of petitioner's airplane, which had taxied into a private hangar within the curtilage of petitioner's house after crossing the United States border, violated the Fourth Amendment.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

In the Supreme Court of the United States

OCTOBER TERM, 1989

No. 89-1737

NELSON EDGAR EMMENS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 15-21) is reported at 893 F.2d 1292. The orders of the district court (Pet. App. 3-7, 8-9) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on February 7, 1990. The petition for a writ of certiorari was filed on May 7, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After entering a conditional guilty plea in the United States District Court for the Southern District of Florida,

petitioner was convicted of importing at least five kilograms of cocaine, in violation of 21 U.S.C. 952(a) and 960(a)(1). He was sentenced to a term of 210 months' imprisonment, to be followed by a five-year term of supervised release. He was also ordered to pay a $150,000 fine. The court of appeals affirmed.

1. Petitioner was the subject of a lengthy criminal investigation conducted by the United States Customs Service, the Drug Enforcement Administration, and the Internal Revenue Service. Petitioner, a pilot who lived next to a private airstrip in Delray Beach, Florida, was suspected of smuggling narcotics into this country. In early May 1988, federal authorities learned from several confidential sources that petitioner would be flying a load of cocaine from Colombia to either Florida or the Bahamas. By May 11, federal agents had received sufficient additional information to track petitioner's flight and intercept him. Pet. App. 3-4; Tr. 46-47.[1]

The agents learned that petitioner, flying a Piper Aztec airplane, would be landing in southern Florida on the evening of May 11. According to the agents' informants, petitioner would land either at the Antiquers Field in Delray Beach near his house, or at a deserted spot near Lake Wales. Pet. App. 4; Tr. 48-51. In the early afternoon of May 11, the DEA received word that petitioner was heading back from Colombia and was flying over the Gulf of Mexico. The DEA alerted the Customs Service, which dispatched a radar plane to the Gulf to track petitioner. The Customs Service also sent a helicopter carrying a team of agents to the Delray Beach area in order to intercept petitioner after he landed. Pet. App. 4, 17; Tr. 52-53.[2]

[1] "Tr." refers to the transcript of the suppression hearing held on July 21, 1988.

[2] By this time, the authorities anticipated that petitioner would be landing at the airstrip next to his house. A team of agents therefore

In the late afternoon, a Customs Service radar plane detected petitioner's plane flying over the Gulf of Mexico. The plane, traveling north and then due east toward southern Florida, was flying at a low altitude. The plane was not sending a transponder signal to identify itself, and it occasionally deviated from its flight path, apparently in order to check for any surveillance. The Customs Service also tracked another plane in the vicinity, which appeared to be acting as a look-out for petitioner. Pet. App. 4, 17; Tr. 5-6, 62-63.

Petitioner's plane crossed the United States border at Naples, Florida. A second Customs Service radar plane was following petitioner and was in contact with the intercept helicopter and the agents on the ground. At approximately 8 p.m., petitioner approached the airstrip at Antiquers Field in Delray Beach; the radar plane alerted the helicopter and directed it to land immediately after petitioner in order to intercept him. The radar plane watched as petitioner's plane landed and taxied into a private hangar near a house. The radar plane relayed that information to the helicopter, which landed shortly afterward. Pet. App. 4; Tr. 7-8, 55-56.

When the helicopter landed, petitioner's plane was parked inside the hangar, and the hangar door was closing. Customs agents, wearing identifying jackets and carrying weapons, fanned out from the helicopter and approached the hangar. Customs Special Agent Gary Pior, the lead agent, spotted petitioner standing inside the hangar at the rear of the plane. When petitioner saw the agents, he immediately dropped to the ground and lay spread-eagle. Agent Pior ran up to petitioner, who was lying across the threshold of the hangar, in order to stop the hangar door from closing on petitioner's legs. Pet. App. 4; Tr. 10-11.

---

assembled at a nearby shopping center to await further instructions. Tr. 54.

Pior detained petitioner and, through the partially open hangar door, noticed that there appeared to be two figures in the back seat of the airplane. Pior and other agents then entered the hangar "to make sure that there was no one else around." Tr. 12. As Pior explained, "[i]t was a precautionary sweep of the area, to make sure that our safety and the safety of [petitioner] was utmost." Tr. 12.[3] As Pior approached the plane, he noticed that the plane bore taped, altered tail numbers. Pior also realized that the two figures he had seen were actually mannequins of Prince Charles and Princess Diana; the mannequins were propped up on a pile of duffel bags. The agents found no other persons inside the hangar. Pet. App. 4-5; Tr. 13-15.

Pior tried to open the plane's door, but it was locked. Pior then asked petitioner for the key and took it from him. Inside the plane, Pior discovered 12 duffel bags and an extra fuel tank. He opened one of the duffel bags and found individually wrapped packages that appeared to contain narcotics. Pior had petitioner placed under arrest; Pior then conducted a field test of the contents of one of the packages. The contents tested positive for cocaine. The agents then seized the airplane and its contents and secured the area. Pet. App. 4-5, 18; Tr. 16-19, 34-37.[4]

---

[3] The hangar was about 60 feet from petitioner's house, which occupied a 2.2-acre lot in Antiquers Field, a private residential community. Residents shared a centrally located grass airstrip. Petitioner's property "was enclosed on three sides by a hedge; the fourth side abutted the grass airstrip." Pet. App. 17. A walkway and driveway connected petitioner's hangar to his house. The hangar contained "a place for parking [an] airplane, a three-car garage, a small workshop, and a small office." *Ibid.*

The agents made only a cursory, protective sweep search of the hangar, not a full-scale evidentiary search. Pet. App. 4-5, 18.

[4] The government later determined that petitioner's plane was carrying approximately 300 kilograms of cocaine.

2. Petitioner filed a pretrial motion to suppress the seized cocaine. He contended that the agents' warrantless search of his plane, which was located within his hangar on private property, violated the Fourth Amendment. After an evidentiary hearing, the district court denied that motion in August 1988. Pet. App. 3-7. The court noted that "[b]order searches constitute a well-known exception to the mandate of the fourth amendment." *Id.* at 6 (internal quotation marks omitted). And the court further recognized that "a particular *search* may be the functional equivalent of a search at the border if the object of the search has been kept under constant surveillance from the border to the point of search." *Ibid.* (internal quotation marks omitted).

Here, the court "assum[ed] * * * that [petitioner] had a legitimate expectation of privacy in the airplane hangar." Pet. App. 6. Nevertheless, the court found that it was

> undisputed that the aircraft entered the United States without declaring itself [and that] [t]he aircraft had been constantly surveilled since it was located over the Gulf of Mexico until it landed in Delray Beach, Florida.

Ibid. Accordingly, the court held that "[t]he mere fact that a border entry had been made makes the search reasonable." *Ibid.*[5]

3. The court of appeals affirmed. Pet. App. 15-21. In the court of appeals, petitioner did not dispute that, if the agents had searched the plane before it reached his private hangar, the border search doctrine would have rendered the search constitutional. Instead, petitioner principally contended that that doctrine did not apply to the search at issue

---

[5] On petitioner's motion for reconsideration, the district court reopened the record to receive additional evidence regarding the location and function of the private hangar. After considering that evidence, see note 3, *supra*, the district court again denied petitioner's motion to suppress. Pet. App. 8-9.

since it took place within the curtilage of his house. Pet. C.A. Br. 12-16; Pet. C.A. Reply Br. 1-3.

The court of appeals recognized that "neither a warrant nor any level of suspicion is required to search vehicles, including aircraft, arriving in the United States." Pet. App. 19. The court pointed out that

> "[a] border search may be conducted away from the actual border if: (1) there is a reasonable certainty that the object of the search has just crossed the border, (2) the search takes place at the first practicable point after the border was crossed, and (3) there has been no time or opportunity for the object of the search to have changed materially since the time of the crossing."

Ibid. (quoting *United States* v. *Carter*, 760 F.2d 1568, 1576 (11th Cir. 1985)). Here, as petitioner conceded, those three requirements were met. Accordingly, the court concluded that "the warrantless search of [petitioner's] plane was justified as a search at the functional equivalent of the border." Pet. App. 18.

In so holding, the court rejected petitioner's contention that "because the airplane * * * reached an area located within the curtilage of [his] home * * *, Customs was prohibited from searching the plane without a warrant." Pet. App. 19. Like the district court, the court of appeals "[a]ssum[ed] the hangar was actually part of the curtilage of [petitioner's] home." *Ibid.* The court recognized, however, that "[a] dwelling, together with its surrounding curtilage, is not always a sanctuary from law enforcement activity, even if the police act without a warrant." *Id.* at 21. The court therefore "refuse[d] to allow [petitioner] to cross the border in an airplane and then to thwart Customs' lawful right to search that airplane at the first practicable point by his parking the plane in a private place." *Ibid.* In the court's view, "[t]o hold otherwise would be to force

Customs agents to play 'tag' with suspected smugglers." *Ibid.* The court accordingly held that

> Customs' warrantless search of an airplane inside the curtilage of the suspect's home is a lawful search if all other requirements for a valid search of that plane at the functional equivalent of the border are satisfied, including the requirement that there has been no opportunity for the object of the search to have changed materially since the time of the border crossing.

Ibid.

ARGUMENT

1. Petitioner contends (Pet. 6-11) that the Fourth Amendment prohibited the Customs agents from conducting a warrantless search of his airplane after he flew it across the border because, at the time of the search, the plane was parked in a hangar within the curtilage of his home. As this Court recently reiterated, "the Fourth Amendment bars only unreasonable searches and seizures." *Maryland* v. *Buie*, 110 S. Ct. 1093, 1096 (1990). "What is reasonable," the Court has stated, " 'depends on all the circumstances surrounding the search or seizure and the nature of the search or seizure itself.' " *Skinner* v. *Railway Labor Executives' Ass'n*, 109 S. Ct. 1402, 1414 (1989) (quoting *United States* v. *Montoya de Hernandez*, 473 U.S. 531, 537 (1985)). Accordingly, "the permissibility of a particular practice 'is judged by balancing its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests.' " *Skinner* v. *Railway Labor Executives' Ass'n*, 109 S. Ct. at 1414 (quoting *Delaware* v. *Prouse*, 440 U.S. 648, 654 (1979)).

Consistent with "Congress' power to protect the Nation by stopping and examining persons entering this country," the Court has long recognized that "the Fourth Amend-

ment's balance of reasonableness is qualitatively different at the international border than in the interior." *United States* v. *Montoya de Hernandez*, 473 U.S. at 538. Consequently, the Fourth Amendment does not prohibit routine searches at the border, even in the absence of a warrant or any particular level of suspicion. See, *e.g.*, *United States* v. *Ramsey*, 431 U.S. 606, 616-619 (1977); *Carroll* v. *United States*, 267 U.S. 132, 153-154 (1925); *Boyd* v. *United States*, 116 U.S. 616, 623 (1886). Moreover, the so-called "border search" doctrine applies to searches conducted at the "functional equivalent" of the border. *E.g.*, *Almeida-Sanchez* v. *United States*, 413 U.S. 266, 272-273 (1973). As the Court has explained, "searches made at the border, pursuant to the longstanding right of the sovereign to protect itself by stopping and examining persons and property crossing into this country, are reasonable simply by virtue of the fact that they occur at the border." *United States* v. *Ramsey*, 431 U.S. at 616.[6]

Here, petitioner "concedes that the facts presented constitute a search at the functional equivalent of the border." Pet. 6. The record showed that "Customs [agents] continuously tracked [petitioner's] plane as it flew over the ocean and crossed the United States border" and that "[a]s soon as [petitioner] parked the plane, Customs [agents] stopped [him] and conducted the search." Pet. App. 20. As the court of appeals explained, the Customs agents conducted the search at the first practicable point after the border was crossed, for they "allowed [petitioner] only enough time to park the plane in the hangar to prevent [him] from flying away and escaping." *Ibid.*

[6] Indeed, the Court has recently acknowledged that the "longstanding concern for the protection of the integrity of the border * * * is, if anything, heightened by the veritable national crisis in law enforcement caused by smuggling of illicit narcotics." *United States* v. *Montoya de Hernandez*, 473 U.S. at 538.

Contrary to petitioner's submission, the fact that the agents' search took place within the curtilage of petitioner's house does not render the warrantless search "unreasonable." As petitioner correctly points out, the Fourth Amendment generally prohibits warrantless searches of houses, including the area within the curtilage, in the absence of exigent circumstances. See, *e.g.*, *United States* v. *Dunn*, 480 U.S. 294, 300-301 (1987); *Oliver* v. *United States*, 466 U.S. 170, 178 (1984); *Payton* v. *New York*, 445 U.S. 573, 585-586 (1980). Such searches, the Court has recognized, are "presumptively unreasonable." *Payton* v. *New York*, 445 U.S. at 586; see also *Coolidge* v. *New Hampshire*, 403 U.S. 443, 474-475 (1971).

The particular search at issue here—the search of an airplane at the first practicable point after it had crossed the border—is not the sort of "presumptively unreasonable" search the Fourth Amendment categorically condemns. To the contrary, this Court has long held that such warrantless searches are "considered to be 'reasonable' by the single fact that the person or item in question had entered into our country from outside." *United States* v. *Ramsey*, 431 U.S. at 619. The fact that petitioner managed to park his airplane within the curtilage of his house before the authorities arrived on the scene should not alter that assessment. Persons who enter the country at the border certainly know that they are subject to searches and inspections conducted by the Customs Service. Moreover, the reasonableness of the particular search in this case is buttressed by the fact that the Customs agents had probable cause to believe that the plane was carrying cocaine—a point petitioner does not dispute. And even outside the context of a border search, a suspect cannot defeat the right of police officers to arrest and search him by retreating from a public place into a private home while the officers are in hot pursuit. See *United States* v. *Santana*, 427 U.S. 38 (1976).

On the record presented, the court of appeals therefore correctly held that the agents' warrantless search of petitioner's plane was "reasonable" under the Fourth Amendment. And since this case, as petitioner points out, appears to present an "issue of first impression," Pet. 6, and involves an unusual set of circumstances not likely to recur with any frequency, further review is not warranted.

2. In any event, this case is not a suitable vehicle for resolving the issue petitioner presents since the agents' warrantless search may also be upheld on an alternative ground. By the time petitioner's plane landed in Delray Beach, the investigating agents had probable cause to arrest petitioner on narcotics smuggling charges. Petitioner's flight pattern over the Gulf of Mexico corroborated the confidential informants' information about petitioner's smuggling activities, and the appearance of a second "counter-surveillance" plane suggested that petitioner was in fact carrying a load of contraband. Although Agent Pior, the arresting officer, had no personal knowledge of these facts, he was under orders, from the Customs and DEA agents conducting the investigation, to intercept petitioner on the ground. Cf. *Whiteley* v. *Warden*, 401 U.S. 560, 568 (1971); see 2 W. LaFave, *Search and Seizure* § 3.5(b) (1987). In these circumstances, petitioner was subject to lawful arrest when Agent Pior found him lying across the threshold of the hangar. See *United States* v. *Santana*, 427 U.S. at 42-43.

Once petitioner was in custody, the agents on the scene were entitled to enter the hangar to conduct a cursory, protective sweep—a point petitioner does not dispute. See Pet. 9. Before entering the hangar, Agent Pior noticed two figures that appeared to be sitting inside the plane. That fact alone justified the agents in entering the hangar to ensure that there were no other potentially dangerous individuals on the premises. See *Maryland* v. *Buie*, 110 S. Ct. at 1098. Once legitimately inside the hangar, Agent Pior

saw that petitioner's plane bore altered tail numbers, a telltale sign of smuggling activity, and that it contained two mannequins propped up on duffel bags. These facts, taken together with petitioner's behavior on the scene, provided sufficient probable cause for Agent Pior to believe that the plane was carrying contraband. Accordingly, under the exception to the Warrant Clause applicable to moveable vehicles such as cars and planes, Pior was entitled to search the plane without first obtaining a warrant. See *Michigan* v. *Thomas*, 458 U.S. 259, 261-262 (1982); *United States* v. *Rollins*, 699 F.2d 530, 534 (11th Cir.), cert. denied, 464 U.S. 933 (1983); *United States* v. *Brennan*, 538 F.2d 711, 721-722 (5th Cir. 1976), cert. denied, 429 U.S. 1092 (1977). Since the cocaine was discovered during a lawful search of petitioner's plane, it was not subject to suppression.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

KENNETH W. STARR
Solicitor General
EDWARD S.G. DENNIS, JR.
Assistant Attorney General
JOSEPH C. WYDERKO
Attorney

JUNE 1990

☆ U.S. GOVERNMENT PRINTING OFFICE: 1990—262-203/00953

No. 89-1737

In the Supreme Court of the United States

OCTOBER TERM, 1989

NELSON EDGAR EMMENS,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

REPLY TO BRIEF IN OPPOSITION

John W. Thornton, Jr.
THORNTON, ROTHMAN
& EMAS, P.A.
Attorney for Petitioner
200 South Biscayne Blvd.
Suite 2860
Miami, Florida 33131
(305) 358-9000

QUESTION PRESENTED

WHETHER THE WARRANTLESS CUSTOMS SEARCH OF A PRIVATE AIRPLANE IN A COMPLETELY ENCLOSED PRIVATE HANGAR WITHIN THE CURTILAGE OF PETITIONER'S HOME, IN THE ABSENCE OF EXIGENT CIRCUMSTANCES, CAN BE JUSTIFIED BY THE SEARCH AT THE FUNCTIONAL EQUIVALENT OF THE BORDER EXCEPTION TO THE WARRANT REQUIREMENT OF THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

No. 89-1737

In the Supreme Court of the United States

OCTOBER TERM, 1989

NELSON EDGAR EMMENS,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

REPLY TO BRIEF IN OPPOSITION

REPLY

The government contends that because the prerequisites of a search at the functional equivalent of a border have been met, it is therefore reasonable. The government fails to take into account this Court's language in *Payton v. New York*, 445 U.S. 573, 591 (1980):

> In terms that apply equally to seizure of property and to seizure of persons, the Fourth Amendment has drawn a firm line at the entrance to the house. Absent exigent circumstances, that threshold may not reasonably be crossed without a warrant.

The government further fails to take into account the plain language of the statute which requires Customs to obtain a warrant when dealing with the home. Specifically, 19 U.S.C. 1595(a) reads in pertinent part as follows:

> (1) If any officer . . . has probable cause to believe that—
>
> (A) any merchandise which has been otherwise brought into the United States unlawfully;
>
> is in any dwelling house, store, or other building or place, he may make application, under oath, to any . . . Federal judge, or to any Federal magistrate, and shall thereupon be entitled to a warrant to enter such dwelling house.

Finally, the Court of Appeals for the Second Circuit has recognized that "the border search exception does not justify searches of homes." *United States v. Saint Prix*, 672 F.2d 1077, 1082-1083 n.10 (2d Cir. 1981).

The government says that petitioner does not dispute that there existed probable cause to arrest him. The government's statement is erroneous. Petitioner has always contended that Customs did not have probable cause to arrest him. (See both initial and reply brief filed with Eleventh Circuit). However, it should be noted that this Court in *Payton* found that a warrant is required even if both statutory authority and probable cause are present.

> [A]n invasion of the sanctity of the home . . . is simply too substantial an invasion to allow without a warrant, at least in the absence of exigent circumstances, even when it is accomplished under

> statutory authority and when probable cause is clearly present.

See *Payton*, 445 U.S. at 588, quoting *United States v. Reed*, 572 F.2d 412, 423 (2d Cir. 1978).

The sole issue for this Court to decide, petitioner submits, is whether the Constitution's search warrant requirement takes precedence over the border search exception when it is the home that is being searched. Relying on this Court's prior decisions and the statutory guidance cited above, petitioner requests that this Court grant certiorari so the issue presented can be briefed, argued and decided by this Court.

CONCLUSION

For the foregoing reasons, Petitioner NELSON EMMENS, respectfully prays that the Petition for Writ of Certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit be granted.

Respectfully submitted,

THORNTON, ROTHMAN
& EMAS, P.A.
200 South Biscayne Blvd.
Suite 2860
Miami, Florida 33131
(305) 358-9000

By: _____
JOHN W. THORNTON, JR.

Dated this 3rd day of August, 1990.